

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE KELLY,

Defendant-Appellant.

UNPUBLISHED

October 1, 1999

No. 209509

Recorder's Court

LC No. 96-008794

Before: Gribbs, P.J., and O'Connell and R.B. Burns,* JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of possession with intent to deliver five or more but less than forty-five kilograms of marijuana, MCL 333.7401(2)(d)(ii); MSA 14.15(7401)(1)(2)(d)(ii), for which he was sentenced to probation for one year. He appeals as of right. We vacate defendant's conviction and remand for entry of a judgment of conviction of possession of five or more but less than forty-five kilograms of marijuana and resentencing.

At trial, after both sides rested, the trial court noted that defendant was charged with possession with intent to deliver. The trial court announced that it found defendant "guilty of possession of [a] controlled substance," and analyzed the elements of the crime as set forth in CJI2d 12.5 (Unlawful Possession of a Controlled Substance). When asked by the prosecutor whether it was therefore acquitting defendant "on possession with intent to deliver," the court responded, "That's right." The trial judge then left the bench, but, shortly thereafter, called the attorneys back to the courtroom, stated that there was a matter she wished to clarify and remarked that her decision was not prompted by any ex parte communication with anyone connected to the case. The judge referred counsel to the decision in *People v Carlos Jones*, 203 Mich App 74; 512 NW2d 26 (1993), and directed them to return in a couple hours. When counsel returned, the judge stated that she had made a substantive mistake of law when arriving at her original verdict, which was subject to correction under MCR 6.435(B). She explained that she had been under the erroneous impression that possession of such a large amount of marijuana was a felony and never "intended to find this defendant guilty of a misdemeanor." She then pronounced defendant guilty of possession with intent to deliver, as charged.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant now contends that the trial court lacked the authority to alter its original verdict. We review this issue de novo on appeal. *People v Valeck*, 223 Mich App 48, 50; 566 NW2d 26 (1997); *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

A court has authority to correct substantive mistakes pursuant to MCR 6.435(B), which states:

After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

A substantive mistake is one that is based on a mistaken belief in the facts, e.g., the court confused two codefendants, or a mistake in the applicable law, e.g., imposition of an indeterminate sentence in violation of the *Tanner*¹ rule. *Jones, supra* at 80; Martin, Dean & Webster, Michigan Court Rules Practice (1998 Interim Pamphlet), p 428.

Here, the trial court did not claim that it was mistaken as to the facts. Rather, it stated that it made a mistake of law because it erroneously believed that mere possession of more than five kilograms of marijuana was a felony. However, the only substantive difference between a felony and a misdemeanor is the punishment that can be imposed by law, see e.g., MCL 750.503; MSA 771; MCL 750.504; MSA 28.772, and possible punishment is not a factor to be considered in determining the guilt or innocence of a defendant. CJI2d 3.13; *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Whether or not the charged crime is classified as a felony or a misdemeanor was irrelevant for purposes of determining defendant's guilt or innocence of the charged crime. Indeed, the only difference between the two crimes in question is the element of intent to deliver and, when announcing the original verdict, the trial court expressly stated that it was acquitting defendant on the charge of possession with intent to deliver. Under these circumstances, a substantive mistake of law subject to correction under MCR 6.435(B) has not been shown and, therefore, double jeopardy and public policy considerations precluded the trial court from altering its original verdict. *Jones, supra* at 82; *People v Hutchinson*, 224 Mich App 603, 606; 569 NW2d 858 (1997).

The proper remedy in such a case is to reinstate the original verdict. *Jones, supra*; *Hutchinson, supra*. Defendant, however, also contends that the evidence was insufficient to prove knowing possession. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing the evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

The elements of possession of marijuana are: (1) that the defendant possessed a controlled substance, (2) that the substance was marijuana, and (3) that the defendant knew the substance in his possession was marijuana. MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d); CJI2d 12.5. The evidence showed that two men unloaded a large number of kilo-sized bricks of marijuana from a van

and took them into a house. They unwrapped the bricks and repackaged the marijuana into gallon-sized baggies, several of which were bundled into at least four garbage bags. Defendant went to the house and obtained one of those bags. The bag contained almost fifteen pounds of marijuana worth at least \$13,000. In the main hallway of the house was a garbage can filled with the wrappings from the kilo-sized bricks. It is reasonable to infer that defendant was in the house and obtained his package before the search, given that an officer testified that the house was still under surveillance at the time defendant obtained his bag. One could reasonably infer from the facts and circumstances of the case that defendant knew the bag contained marijuana. While defendant claimed that he did not look inside the bag and relied on the distributor's alleged statement that the bag contained drop cloths, his credibility was an issue of fact for the trier of fact to resolve and did not affect the sufficiency of the evidence. *People v Gerald Jackson*, 42 Mich App 391, 395; 202 NW2d 459 (1972).

There being sufficient evidence to sustain the court's original verdict finding defendant guilty of possession of marijuana and the trial court being without authority to alter that verdict, the original verdict of guilty of possession of marijuana is reinstated and the case is remanded to the trial court for resentencing. *Hutchinson, supra*; *People v Lamb (After Remand)*, 201 Mich App 178, 181; 506 NW2d 7 (1993).

Defendant's conviction of possession with intent to deliver marijuana is vacated and the case is remanded for entry of a judgment of conviction of possession of five or more but less than forty-five kilograms of marijuana and resentencing.

/s/ Roman S. Gibbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns

¹ *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972).